



FACT SHEET

Guardianship and Homeownership for People with Disabilities

Introduction

Because buying a home is a complicated and costly endeavor, a title company, a lender, or other housing professional may question the ability of an individual to understand the issues around homeownership. If they are unsure of the person's ability to understand and commit to stated requirements, they will be hesitant to legally agree to a contract with that person. This fact sheet is meant to help someone who is already a guardian to understand what that guardianship status means in terms of the person you represent purchasing a home. It is also written to familiarize others with alternatives to, and the types of, guardianship available.

No one should ever be considered incompetent merely because they are someone with a disability, even if that disability includes a cognitive impairment. Full guardianship should be considered only as a last resort so as to preserve as many of the individual with disabilities' rights to self-determination as possible.

Why would a title company or lender hesitate to contract with a buyer over age 18 (just because that buyer has a disability)?

Before entering into a legal agreement with anyone, a lender or title company wants to be sure the person has the *capacity* (ability) to understand the decision; has enough *information* (in a way that ensures he/she understands) about the decision, and is *voluntarily* (by personal choice) making the decision. In some cases, a lender or title company cannot in good conscience assume or

assess that the person (though over 18) has the required level of "legal capacity" to agree to the contract's terms. In other words, the title company or lender may be worried that an individual with a disability is unable to give knowing and legal "okay" to the financial responsibilities of homeownership. In such a case, if the individual has an appointed advocate, an advocate who has power of attorney or guardian status of some sort, the lender or title company would feel secure that the best interests of the person with the disability are being considered and protected.

This material was produced with the assistance of the Indiana Housing Finance Authority under the National Affordable Housing Act of 1990, as amended, using HOME Investment Partnerships Program funds allocated by HUD

and developed by the

Indiana Governor's Planning Council for
People with Developmental Disabilities

and

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If I am a guardian, what are my responsibilities buying a home on behalf of a person?

If you are a Guardian of the Person (look at your court document), the judge decided that the individual was unable (incompetent) to make personal decisions about things like where to live, or what medical or social services to receive. This type of guardianship does not give you the right to agree to the purchase of a home on behalf of the “protected person” but should help show that the person is determined “legally competent” (able to purchase the home independently).

If you are a Guardian of the Estate (look at your court document), a judge decided that the person can make personal decisions but is unable to handle his or her own finances or property. This type of guardianship requires you to protect the person’s property and use it for the person’s care, support, education and general good. You may assist the person you represent in the purchase of home, if you feel it is in the person’s best interest.

The judge may have determined that the person was unable (incompetent) to make both personal and financial decisions and named you guardian of the estate and the person. This is called Full Guardianship (look at your court document). If this is the case, you can assist in the purchase of the property if you think it is in your loved one’s best interest.

The fourth type of guardianship is called Limited Guardianship. This gives authority over the “protected person” only for the listed things. If this is the type of guardianship a Judge awarded (check the court document) you would have to see if the right to purchase and sell property or the right to make all financial decisions is specifically listed. If not, you can use the document to show that the person is able to purchase the home independently.



What exactly is guardianship and why should I first consider its alternatives?

When a person reaches age 18, including a person with a cognitive impairment, he or she gets all the legal rights and responsibilities of any adult. The various guardianships and their options are ultimately there to protect the person you represent from people who might try to exploit his/her inability to make an informed choice in his/her own best interest. There may be less restrictive alternatives that would serve the same purpose.

Guardianship is a legal process by which a guardian is appointed to make decisions on behalf of an individual (a “protected person”) who is deemed to be incapable of making decisions for him/herself. There are different levels and they are explained above. The most important reason to **avoid guardianship** is that it is a measure that deprives a person of his/her rights of citizenship. No matter the type, the “protected person” has lost some control of his/her own decision making. Guardianship conveys a strong message of **inability** and in addition to being expensive and time-consuming, it can be very difficult to reverse. Once a Judge has determined a person is “incompetent” in an area or areas of his/her life, proving competency later will be challenging.

What are some of the alternatives to guardianship that might help in home purchasing?

The least intrusive alternative would be a document signed by the individual with a disability that designates an *advocate* without whom the individual will not make major decisions. This may or may not help in the home buying process as the other party (parties) may question whether the individual had the legal ability to consent to the advocacy agreement.

If a person’s income is derived primarily from Social Security, Supplemental Security Income (SSI), Social Security Disability Insurance

(SSDI), or other government benefits, it may be enough for a person to be appointed the *representative payee* so that the party (parties) are assured finances are properly managed.

A *durable power of attorney* is a third option. The *power of attorney* is a legal document in which a person (the principal) appoints a second person (the agent) to act on his or her behalf in specific matters. A person must be mentally competent (in the legal sense) to write a power of attorney.

How does one decide if his or her family member would benefit from a guardian or guardian alternative?

In the case of homeownership, one should think about how well the person can clearly say what he/she wants. Also, how well he/she can show the ability to make an informed choice to accept all the consequences (especially financial) of home ownership.

You may know best whether your family member has the ability to give reasoned and well-informed consent and whether or not his or her ability depends on subject matter (for example: Ann can make personal decisions easily but needs help with financial ones).

If the alternatives to guardianship do not seem as if they will work, is there a form of guardianship most often used in home buying situations?

The Guardianship of the Estate is most often used. Second is a Limited Guardianship that lists either an open right to financial decisions or a right to financial decisions over a stated amount.

If I am or become Guardian of the Estate, will I be held responsible legally and financially for the house?

It is important to remember that a guardian *is not personally responsible for any expenses incurred by the “protected person”*. A guardian is *only* expected to use the funds and assets of the “protected person” to pay the debts and obligations of the “protected person”. When you sign as the guardian on behalf of the “protected person”, you should write after your signature something like, “Guardian for Sally Smith.” This will help make it clear that you (as guardian) are signing something on behalf of the “protected person” and not for yourself. You should also, for your own peace of mind, make it clear in writing that only the protected person’s estate will be responsible.

If I think guardianship is necessary what is the process?

You have to get a lawyer to help you set up a guardianship. Lawyers charge from several hundred to several thousand dollars. Ask about the fee when you first call them. If you think you may qualify as a family of low income, contact the Legal Services Organization of Indiana. Indiana has steps that need to be followed in order to be appointed a person’s guardian. Your lawyer will assist you in following these steps. You should also know that as guardian, you would have to file a yearly report to the court. An attorney will explain all such requirements.

Are all the guardianship alternatives possible to do without an attorney?

Yes. The most difficult would be *the durable power of attorney*. If you choose to use a software kit or recommended forms, you may want an attorney to review the document to be certain it meets all legal requirements.

Are there resources we could consult to better understand this issue?

Yes. Places to contact would include:

Indiana Protection and Advocacy Services,
4701 North Keystone, Suite 222, Indianapolis,
IN 46205 (317) 772-5555;

The Arc of Indiana, 110 E. Washington Street,
Indianapolis, IN 46204 (800) 382-9100;

The Indiana State Guardianship Association,
2506 Willowbrook Parkway, Suite 100,
Indianapolis, IN 46205 (317) 251-0005;

The Indiana State Bar Association, 230 East
Ohio Street, Indianapolis, IN 46204 (317) 639-
5465;

The ARCus, Washington, D.C., (800) 433-5255,
Internet: <http://TheArc.org>

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